

# United States Court of Appeals for the Federal Circuit

04-3442

LOURDES M. GARCIA,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Katherine A. McDonough, Baptiste & Wilder, P.C., of Washington, DC, argued for petitioner.

Todd M. Hughes, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent. On the brief were Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director; Deborah A. Bynum, Assistant Director; and Steven J. Abelson, Attorney. Of counsel on the brief was Francesca Alvaro, Attorney, Associate Chief Counsel's Office, United States Customs and Border Protection, United States Department of Homeland Security, of Miami, Florida.

Appealed from: United States Merit Systems Protection Board

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v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, CLEVINGER, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, and PROST, Circuit Judges.

PER CURIAM.

## ORDER

This case, having been argued before a panel of three judges on May 6, 2005, and thereafter having been referred to the circuit judges who are in regular active service and a poll having been requested and taken,

IT IS ORDERED THAT:

The Court sua sponte orders that this case be heard en banc.

The parties are invited to submit additional briefs addressing the following issues:

- (1) Whether 5 U.S.C. § 7701 should be construed to incorporate a non-frivolous allegation standard for establishing the jurisdiction of the Merit Systems Protection Board.
- (2) Whether, if 5 U.S.C. § 7701 is ambiguous as to the standard for jurisdiction, the Board's regulation at 5 C.F.R. § 1201.56(a)(2) is entitled to Chevron deference.

(3) Whether, if 5 U.S.C. § 7701 incorporates a non-frivolous allegation standard for establishing the jurisdiction of the Board, it should be construed to also incorporate a standard that requires a non-frivolous allegation be supported by some evidence.

This case will be heard en banc on the basis of the briefs already filed and any additional briefs addressing the issues set forth above. An original and thirty copies of all additional briefs shall be filed, and two copies served on opposing counsel. Such additional briefs shall be filed simultaneously by the parties, sixty days from the date of this Order, and shall not exceed 7,000 words in length.

The Merit Systems Protection Board ("Board") is invited to submit an amicus curiae brief. The brief of the Board also shall be limited to 7,000 words, shall be filed within sixty days from the date of this Order, and shall comply with Fed. R. App. P. 29 and Federal Circuit Rule 29. Motions for leave to file other amicus curiae briefs may also be submitted.

Oral argument is scheduled for 10 a.m. on Thursday, October 6, 2005, in Courtroom 201. Counsel for each side shall have 30 minutes to argue. Counsel for the Board shall have 20 minutes to argue.

MAYER, Circuit Judge, dissents.

FOR THE COURT

June 17, 2005  
Date

s/Jan Horbaly  
Jan Horbaly  
Clerk

cc: Katherine A. McDonough, Esq.  
Todd M. Hughes, Esq.